

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALONZO L. WATSON, SR.**  
Claimant

VS.

**LEWIS TOYOTA, INC.**  
Respondent

AND

**KANSAS AUTOMOBILE DEALER  
WORK COMP FUND**  
Insurance Carrier

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Docket No. 1,048,815

**ORDER**

Respondent and its insurance carrier (respondent) request review of the April 14, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

**ISSUES**

The ALJ awarded claimant benefits<sup>1</sup> after concluding the claimant suffered an accidental injury arising out of and in the course of his employment with the respondent. The ALJ also concluded that notice was timely. The ALJ determined the date of accident was December 18, 2009, the date claimant provided written notice of his accidental injury.<sup>2</sup>

The respondent requests review of the preliminary hearing Order. The respondent's application for review states it is based on the following issues:

- whether the claimant suffered an accidental injury arising out of and in the course of his employment with respondent;

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<sup>1</sup> Claimant was awarded medical treatment with Dr. Curtis and all referrals for treatment of claimant's right shoulder and both knees, and unauthorized medical expenses set out in Exhibit 2 of the preliminary hearing transcript were ordered paid up to the statutory limit. Temporary total disability compensation was denied. At the time of the preliminary hearing, claimant was receiving unemployment insurance.

<sup>2</sup> ALJ Order (Apr. 14, 2010).

- whether notice was given and whether notice was timely.

The main issue respondent addresses in its brief is whether claimant provided timely notice to the respondent. Respondent alleges claimant provided no notice of accidental injury within the 10 days specified by K.S.A. 44-520. Consequently, respondent requests the preliminary hearing Order be overturned and compensation denied.

Claimant alleges the respondent has abandoned its appeal on the issue of whether claimant suffered an accidental injury arising out of and in the course of his employment with the respondent since the respondent failed to address the issue in its brief. On the issue of timely notice, claimant requests the ALJ's finding and conclusion be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant began working for respondent in 2007 as a car detailer. Claimant would ordinarily work 6 days a week for 8 or 9 hours a day. Claimant normally would detail at least 6 to 8 vehicles per day.<sup>3</sup> Claimant's work duties involved repetitively climbing in and out of vehicles as well as repetitive bending and twisting to clean the inside and outside of vehicles.

When claimant began working for respondent in 2007, he was not experiencing any problems with his right shoulder or his knees,<sup>4</sup> although claimant had a history of right knee problems. Claimant was under no restrictions for any part of his body when he began working for the respondent.<sup>5</sup> While working for the respondent, claimant began to notice swelling in his right knee<sup>6</sup> and he also began having problems with his right shoulder and his left knee.<sup>7</sup> Claimant testified that he believed the constant bending and reaching and

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<sup>3</sup> P.H. Trans. at 10.

<sup>4</sup> *Id.*, at 16.

<sup>5</sup> *Id.*, at 18.

<sup>6</sup> *Id.*, at 18, 19.

<sup>7</sup> *Id.*, at 19, 20.

being on his feet caused these injuries.<sup>8</sup> Claimant also testified June 8, 2009, was the last day he worked for the respondent.

At the request of claimant's attorney, Dr. Edward J. Prostic examined the claimant on January 8, 2010. He opined:

During the course of his employment through the last date worked in June, 2009, Alonso [*sic*] L. Watson Sr. sustained repetitious minor trauma to his right shoulder and both knees, aggravating pre-existing degenerative joint disease.<sup>9</sup>

Steve Cain, respondent's general manager, indicated that the first notice respondent had of a work-related accident suffered by the claimant was the receipt of a letter dated December 18, 2009, from claimant's attorney with an enclosed written claim, and the filing of the E-1 application for hearing,<sup>10</sup> which was filed with the Division of Workers Compensation on December 24, 2009.

The claimant invites the Board to determine that the respondent abandoned its appeal on the issue of whether claimant suffered an accidental injury arising out of and in the course of his employment with the respondent. This Board Member rejects that invitation. However, since respondent has failed to advance a sound legal or factual reason or argument to reverse the ALJ's determination on this issue, this Board Member finds no reason to disturb the ALJ's determination that claimant suffered an accidental injury arising out of and in the course of his employment with the respondent. The ALJ's finding in this regard is affirmed.

Respondent argues claimant has pled a date of accident of June 8, 2009,<sup>11</sup> that notice was not received until December 2009 and, thus, the notice is well past the last date claimant worked for respondent and well past the pled date of the accident. The respondent appears to be taking the position that claimant pled a series of accidents culminating on June 8, 2009, and, thus, claimant must give notice within 10 days of such date. The date contained within the E-1 is not necessarily determinative particularly when a series is claimed.

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<sup>8</sup> *Id.*, at 27.

<sup>9</sup> *Id.*, Cl. Ex. 1.

<sup>10</sup> *Id.*, at 62, 63.

<sup>11</sup> The E-1 (Application for Hearing) shows the date of accident as a series from December 1, 2008, to June 8, 2009.

To determine whether notice is timely, one must first determine the date of the accident. When an accident is the result of a series of traumas or repetitive use, as in the instant case, K.S.A. 2009 Supp. 44-508(d) instructs one on how to determine the date of the accident. That statute states, in pertinent part:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker.

In the case at bar, the claimant was not taken off work nor was he restricted from performing his duties by an authorized physician. Further, in the evidence compiled to date, there is no evidence that the claimant received a written communication that his condition was work related. Consequently, the date of accident is the date the employee gave written notice of the injury to the respondent. Written notice was first given to respondent December 18, 2009, when respondent received written claim. K.S.A. 44-520 requires that notice of the accident be given to the employer within 10 days after the date of the accident. The date of the accident is December 18, 2009, and notice was provided the same day. The finding and conclusion by the ALJ that notice was timely is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of ALJ Brad E. Avery dated April 14, 2010, is affirmed.

**IT IS SO ORDERED.**

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<sup>12</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of June, 2010.

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CAROL L. FOREMAN  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Jeffrey S. Austin, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge